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MARCHETTI [illegible]
Executrix of [illegible]
Dias, Deceased, [illegible]
ADELA BAUS and [illegible]

Petitioners,

—against—

PAN AMERICAN AIRWAYS, INC.,

Respondent,

and

R. O. D. SULLIVAN,

Defendant.

PETITIONERS' REPLY BRIEF.

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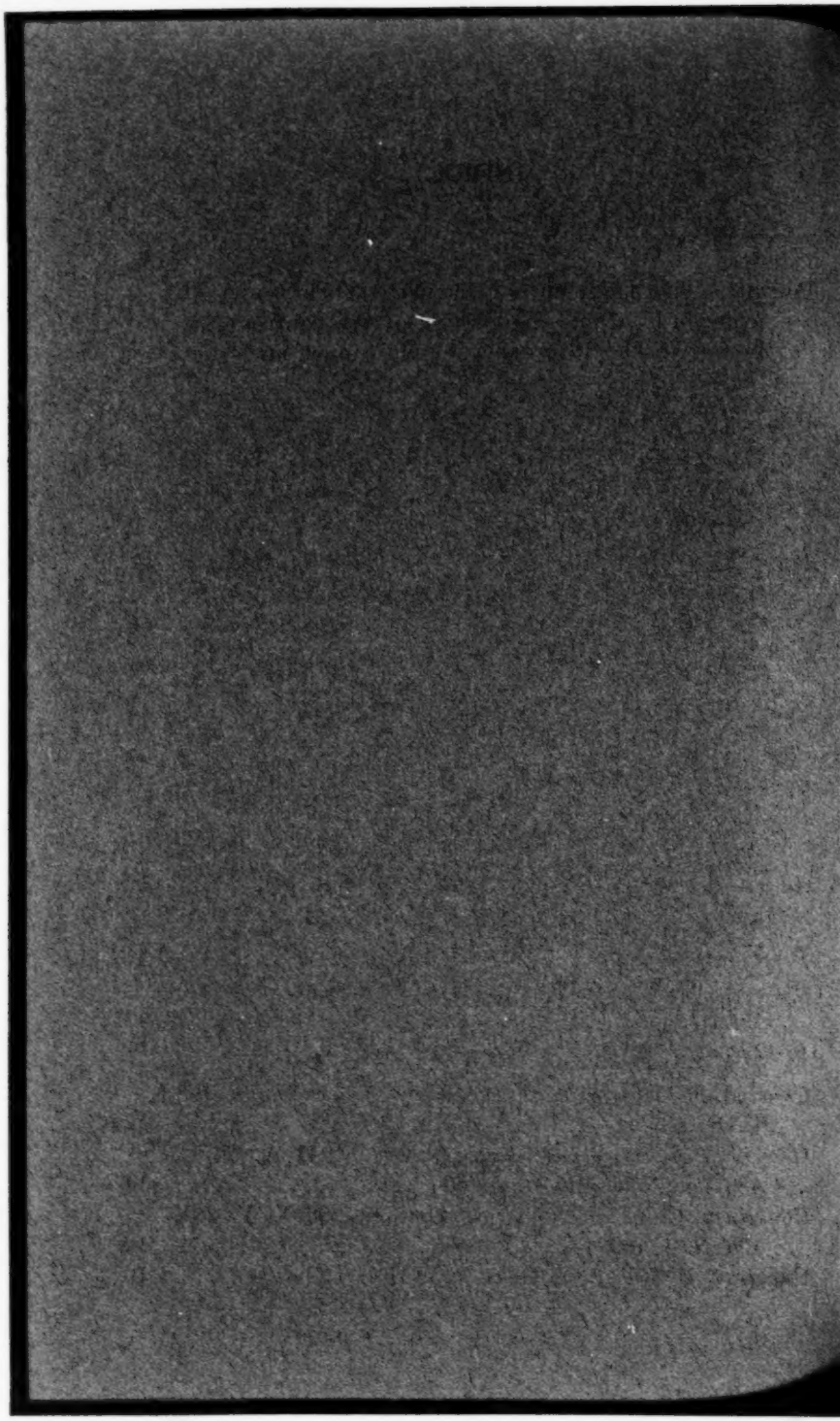

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 301.

MARCELINO GARCIA and VICTOR ALVAREZ, as Executors of the Last Will and Testament of Manuel Diaz, Deceased, EDITH GILMOUR DIAZ, MARY ADELA EADS and MANUEL DIAZ, JR.,

Petitioners,

—against—

PAN AMERICAN AIRWAYS, INC.,

Respondent,

and

R. O. D. SULLIVAN,

Defendant.

PETITIONERS' REPLY BRIEF.

The principal arguments advanced by respondent in opposition to the issuance of a Writ of Certiorari may be summarized as follows:

(a) That the order and judgment of the New York Court of Appeals here sought to be reviewed is not final.

(b) That because this court denied certiorari in *Wyman v. Pan American Airways, Inc.*, 181 Misc. 963; 267 App. Div. 947; 293 N. Y. 878; cert. den. 324 U. S. 882, it should do so here.

(c) That the Convention is analogous to the Vessel Limitation of Liability Statute (R. S. Sec. 4283, 46 U. S. C. A. Sec. 183).

None of the foregoing premises is valid.

POINT I.

The judgment of the New York Court of Appeals is a final disposition of the controversy. In the absence of review by this court no issues remain to be litigated.

Respondent challenges the jurisdiction of this court under Section 237 of the Judicial Code. The fact is that the jurisdiction of this court in this case does not depend solely upon the Judicial Code but on Article 3, Sec. 2, of the Constitution of the United States, which provides in part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. * * *"

Under the Constitution, this court has express jurisdiction whenever a treaty of the United States or the Constitution are in issue. Apart from that, however, the judgment sought to be reviewed is a final judgment within the purview of Section 237.

The New York Court of Appeals, the court of last resort in that State, has rendered a final judgment from which no appeal lies to any tribunal but the Supreme Court of the United States. The Court of Appeals has finally and conclusively sustained the validity of the Convention and the defenses based thereon, and has decreed that by virtue of its provisions the petitioners possess only a limited right to recover nominal damages of $8,291.87 in this action where their provable damages aggregate $777,745.64.

The petition recites that respondent has made an unequivocal tender of the amount stipulated in the Convention and is now willing to pay that sum, viz., $8,291.87, together with the additional sum of $750.00, the alleged limit of its liability under the Convention for the loss of

the decedent's baggage and personal effects. *On February 26, 1945, respondent served upon petitioners' counsel a formal Offer of Judgment for $9,050.00, together with the costs of the action.*

Respondent does not deny that it has tendered that sum to the petitioners in discharge of its liability. Neither does it deny that its offer is continuing and open. It merely urges that there is nothing in the record to that effect. On that technicality, it seeks to deprive the petitioners of the right of review by this court of the patently erroneous interpretation by the New York courts of the Convention and the relevant provisions of the Constitution of the United States.

In re Summers, 325 U. S. 561, 566, this court said:

> "A case arises, within the meaning of the Constitution, when any question respecting the Constitution, treaties or laws of the United States has assumed 'such a form that the judicial power is capable of acting on it.' *Osborn* v. *Bank*, 9 Wheat. 738, 819. The Court was then considering the power of the bank to sue in the Federal courts. A declaration on rights as they stand must be sought not on rights which may arise in the future, *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226, and there must be an actual controversy over an issue, not a desire for an abstract declaration of the law. *Muskrat* v. *United States*, 219 U. S. 346, 361; *Fairchild* v. *Hughes*, 258 U. S. 126, 129. The form of the proceeding is not significant. It is the nature and effect which is controlling. *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 259."

Clearly, the case at bar "has assumed 'such a form that the judicial power (of this court) is capable of acting on it.'"

An issue of transcendent importance, stemming from fundamental concepts of the American theory of government and calling for an appraisal of the power of the

President to summarily abolish the rights of American citizens secured to them by a friendly sovereign power is here presented. Does the Convention accomplish the radical results attributed to it by the New York courts? If so, may such results be effected without doing violence to the Constitution? Issues so grave should not be kept from the scrutiny of this court.

Respondent urges that "it is perfectly conceivable that when the facts are presented to the Trial Court, the plaintiffs will recover nothing." A strange statement, considering that the Civil Aeronautics Board, after investigating this disaster, attributed it solely to respondent's negligence (C. A. B. report, dated Sept. 7, 1943, File 2143. Docket AC-5).

The judgment here sought to be reviewed meets the test of finality formulated by this court in *Department of Banking* v. *Pink*, 317 U. S. 264, 268 where it was said:

> "For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final * * *, but rather whether the record shows that the order of the Appellate Court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court."

The determination of the New York Court of Appeals in this case is "subject to no further review or correction in any other state tribunal" and it is also "final as an effective determination of the litigation", within the rule laid down in *Market Street Railway Co.* v. *R. R. Commission of Calif. et al.*, 324 U. S. 548, 551. It expressly defines and almost completely nullifies the plaintiffs' right of redress. The assertion that the necessary finality is lacking is, therefore, thoroughly unfounded. Further proceedings in the state courts would be an empty and fruitless gesture.

POINT II.

No federal questions were presented in *Wyman* v. *Pan American Airways, Inc.* The refusal of this court to grant certiorari in that instance is wholly irrelevant.

Respondent urges that because the Supreme Court of the United States refused to grant certiorari in *Wyman* v. *Pan American Airways, Inc.,* 181 Misc. 963; 267 App. Div. 947; 293 N. Y. 878; cert. den. 324 U. S. 884, it should act similarly here. That is indeed a novel argument. The denial of certiorari in one case is scarcely reason for denying that remedy in another case where entirely different facts and issues are involved. Parenthetically, respondent's statement that the award in that case was based on the Convention is incorrect. The court stated that the Convention did not create a right of action and predicated its judgment on the Death on the High Seas Statute.

In *Wyman* v. *Pan American Airways, supra,* the plaintiff did not invoke the Constitution of the United States and no issue cognizable by this court was raised or relied on at any stage of the proceedings. The plaintiff accepted the Convention as controlling law and contended merely that inasmuch as the plane was enroute at the time of the accident from one United States possession to another, *i. e.,* Guam to Manila, the Convention was inapplicable. The disaster presumably occurred either within the territory of United States possessions or on the intervening high seas. Hence, in order to recover, the plaintiff was compelled to rest her case on some United States law or statute. There is, therefore, no parallel between the *Wyman* case and the case at bar. Here, petitioners, in accordance with settled law, base their right of recovery on the law of Portugal, where the negligent act of the respondent occasioned Mr. Diaz' death.

The New York courts, in the only opinion written in the *Wyman* case, that of Trial Term, expressly held that "no new substantive rights were created by the Warsaw Convention * * *" and that since no foreign law was involved, "the right to any recovery in this action thus must depend on some statute." It therefore rested its award on the Death on the High Seas Act.

Since no evidence of the carrier's negligence was adduced at the trial, the court employed the presumption of liability created by the Convention to supplement that deficiency. Having failed to sustain the burden of establishing negligence, the plaintiff was in no position to reject the presumption of liability which the Trial Court considered the Convention afforded.

POINT III.

There is no analogy between the Convention and the Vessel Owners Limitation of Liability Statute (R. S. 4283, 46 U. S. C. Sec. 183).

Recognizing that no precedent exists for the exoneration of a common carrier's liability by Presidential fiat, respondent attempts to create one by drawing an analogy between the Convention and the Federal Shipowners Limitation of Liability Statute (R. S. 4283, 46 U. S. C. Sec. 183).

The error in the attempted analogy is the underlying fallacy of confusing a legislative act of Congress in a field reserved to it by the Constitution with an executive act of the President which encroaches upon a prerogative of Congress, *i. e.*, the regulation of foreign commerce. The Convention is no more than an agreement by the Executive Department with certain foreign powers. It is not a statute, and under elementary principles it is irrelevant to events transpiring in the territories of nations not

party to the Convention and involving only American citizens.

While this court in *The Titanic* (*Ocean Steam Navigation Co.* v. *Mellor*), 233 U. S. 718, upheld the right of Congress to legislate with respect to interstate and foreign commerce, in *Western Union Telegraph Co.* v. *Brown*, 234 U. S. 542, 547, it confirmed the rule that the *lex loci* controls the measure of recovery in tort actions and at the same time rejected, as unconstitutional, encroachment upon that power of Congress by another agency of government. In the case last cited, Mr. Justice Holmes said:

> "Whatever variations of opinion and practice there may have been, it is established as the law of this court that when a person recovers in one jurisdiction for a tort committed in another he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, *and that is not only the ground but the measure of the maximum recovery.*" (Italics ours.)
>
> * * * *
>
> "But the act is also objectionable in its aspect of an attempt to regulate commerce among the States."

In 1920, six years after the decision in *The Titanic*, Congress in recognition of the principle that the *lex loci* controls not only the right of recovery, but also the measure of damages, enacted legislation preserving the rights created under foreign law for death on the high seas when asserted in our courts:

> "Sec. 764. Rights of action given by laws of foreign countries.
>
> Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate

action in admiralty in the courts of the United States without abatement in respect to the anount for which recovery is authorized, any statute of the United States to the contrary notwithstanding. Mar. 30, 1920, c. 111, Sec. 4, 41 Stat. 537. 46 U. S. C. A. 764."

By virtue of that enactment, Congress insured that a right of recovery created under foreign law could be successfully asserted in our courts, notwithstanding the limitation of liability afforded by the Vessel Limitation of Liability Statute (R. S. 4283, 46 U. S. C. A., Sec. 183). *Egan* v. *Donaldson Atlantic Line* (D. C. N. Y. 1941), 37 Fed. Supp. 909; *The Vestris* (D. C. N. Y 1931), 53 Fed. 2d, 847.

POINT IV.

Replying to Respondent's Point IV.

Respondent's sole answer to the conflict between the Convention and the Constitution (Art. I, Sec. 8, Cl. 3, and the Fifth Amendment), is a decision of the United States District Court. *Indemnity Insurance Company of North America* v. *Pan American Airways, Inc.*, 58 Fed. Supp. 338, which is manifestly unsound. The superficial reasoning of the opinion is emphasized by the self-contradictory opinion of the same Judge in another proceeding in the same case reported in 57 Fed Supp. 980 and hereinafter discussed. The court fell into the error of accepting the Convention, a mere executive agreement, as analogous to the Shipowners Limitation of Liability Statute (R. S. 4283, 46 U. S. C. A. Sec. 183). Of course, it is no such thing, and the attempted analogy begs the question. The court declined to decide whether the Convention was self-executing and operative to the extent of creating a cause of action, but held it effective as a limitation.

That conclusion conflicts squarely with the decision of the same judge in *Indemnity Insurance Company of North America* v. *Pan American Airways*, 57 Fed. Supp. 980, where he held (1) that the law of Portugal controls this action; (2) that it is invokable and enforceable in the New York courts; (3) that it does not conflict with public policy, and (4) that the Convention is irreconcilable with the settled law. He there stated (pp. 981, 983):

> "The rule is well established that the law of the place where the wrong is committed governs the right of action for death * * * It is equally well settled that such rights, having their foundation in the law of a foreign state, will be enforced unless enforcement would offend the public policy of the forum.
>
> * * * *
>
> In the light of these authorities, I am not persuaded that New York's public policy is today inhospitable to the assertion of the rights declared in the complaint.
>
> * * * *
>
> That brings us to a wholly different problem arising out of the Warsaw Convention under which, if it governs this case, the defendants' liability is limited to $8300. *I do not see how such a limitation can be administered if multiple actions may be brought by different parties.*" (Italics ours.)

The court's statement that "the broad sweep of the treaty making power is in good measure reflected in the absence of any decision holding a treaty unconstitutional" is meaningless in this case. This Convention is no solemn treaty of the United States. No similar commitment has ever before been made by a President of the United States, hence no judicial precedent for holding it unconstitutional exists. Respondent has signally failed to meet the challenge to point to a single treaty or convention, regulatory of foreign commerce, which the courts have accepted as a law in the absence of an already existing

law or specific legislation by Congress. On the contrary, in *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 738, the late Chief Justice held that while Article 2, Clause 1 of the Shipowners Liability Convention (54 Stat. 1695) was rendered effective by virtue of the already existing Jones Act, *"the exceptions permitted by Clause 2 are not operative in the absence of Congressional legislation giving them effect."*

The exercise by Congress of the power imparted to it by Article 1, Section 8, Clause 3, of the Constitution is subject to the Fifth Amendment of the Constitution and must be consonant with due process of law (*Currin* v. *Wallace*, 306 U. S. 1, 14, 59 Sup. Ct. 379). How more compelling therefore is the necessity that any executive regulation comply with that requirement.

In three respects this Convention violates due process and conflicts with the Fifth Amendment. First, as an Executive Act under the treaty power, it operates in a field to which the treaty making prerogative does not extend, *i. e.*, private litigation in the New York courts between New York subjects arising out of a New York contract and based upon a tort committed in the territory of a sovereign foreign power with which no treaty on the subject exists. Secondly, it violates due process in that it is utterly incompatible with settled principles of international law for the President to attempt to modify or limit, by means of an agreement with third party powers, rights acquired by American citizens under the laws of a friendly independent sovereign not party to such treaty. Thirdly, it violates due process in that any encroachment by the Executive upon the powers exclusively vested in Congress by the Constitution (the regulation of foreign commerce in such a power), is the absolute negation of due process.

Just as the power of Congress in this or any field is circumscribed by the Constitution, equally so is the power of the President restricted by that instrument.

The New York courts have upheld the wholly fallacious theory that the President may lawfully annul a right of action, a property right (*Brewster* v. *Rogers,* 169 N. Y. 73), possessed by citizens of that state and at the same time exculpate a New York corporate common carrier from the consequences of its negligence. The President has no such power. The Constitution does not give it to him. In *Wynehamer* v. *People,* 13 N. Y. 378, 398, the court said:

> "'No person can be deprived of his property without due process of law' by the legislature or any other power of government. When a law annihilates the value of property and strips it of its attributes by which alone it is distinguishable as property, the owner is deprived of it according to the plainest interpretations, and certainly within the spirit of a Constitutional provision intended expressly to shield private rights from the exercise of arbitrary power."

In *Bertholf* v. *O'Reilly,* 74 N. Y. 509, due process, in the legislative sense, is defined as: "conformity to the settled maxims of free governments, observance of Constitutional restraints and requirements, and an omission to exercise powers appertaining to the judicial or executive departments." The obvious corollary, in the executive sense, is the omission to exercise powers appertaining to the judicial or legislative departments.

In a very recent decision (June 8, 1946) the Supreme Court of Kansas said:

> "The rule is firmly imbedded in American law that the guaranty of due process—whether under the Fifth Amendment, as a limitation upon the power of the Federal Government, or under the Fourteenth Amendment, as a limitation upon the power of the states,—is to be liberally construed to effectuate its purpose of protecting the citizen against arbitrary invasion

of his right of life, liberty and property." *Betts* v. *Easley,* 169 P. (2d) 843.

With respect to the second and third defenses based on the contention that the passenger and respondent adopted the limitation of the Convention by contract, the contract is invalid under the laws of the State of New York where it was made. New York Constitution, Art. 1, Sec. 16; *Conklin* v. *Colonial Canadian Airlines,* 266 N. Y. 244; *Loucks* v. *Standard Oil Co.,* 224 N. Y. 99. In the absence of legislation on the subject by Congress, the New York law controls. *Adams Express Co.* v. *Croninger,* 226 U. S. 491; *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Solan,* 169 U. S. 133. In the former case, this court said at page 500:

> "That the constitutional power of Congress to regulate commerce among the States and with foreign nations comprehends power to regulate contracts between the shipper and carrier of an interstate shipment by defining liability of the carrier * * * needs neither argument nor citation of authority.
>
> But it is equally well settled that until Congress has legislated upon the subject, the liability of such a carrier * * * although engaged in business in interstate commerce * * * may be regulated by the law of the State."

Here Congress has not acted. The President has no power over the subject matter. Hence the law of New York controls the effect of the contract, and under that law the contract is void. *Conklin* v. *Colonial Canadian Airlines,* 266 N. Y. 244, 194 N. E. 692.

This respondent is a New York corporation. The passenger whose death was caused by its negligence, was a citizen and resident of New York. The petitioners are residents of New York. The contract of carriage was

made here. The Constitution of the State of New York specifically prohibits a common carrier such as respondent from arbitrarily limiting its liability.

> "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation. Formerly Sec. 18, renumbered by Constitutional Convention of 1938 and approved by vote of the people, Nov. 8, 1938."
>
> New York Constitution, Art. 1, Sec. 16.

The refusal of the New York courts to recognize the law of Portugal in respect to respondent's tort, and to interpret the contract in the light of the law of New York where it was made, is an abuse of due process and a violation of the Fifth Amendment. Cf. *Yara Engineering Corp.* v. *City of Newark*, 132 N. J. Law 370, 40 A. (2nd) 559.

The cases relied on by respondent, *i. e.*, *Edye* v. *Robertson*, 112 U. S. 580; *Maiorano* v. *Baltimore & Ohio R. R. Co.*, 213 U. S. 268; *Hamilton* v. *Erie Railway Co.*, 219 N. Y. 343, constituted instances in which a treaty entered into between the United States with foreign powers was invoked on behalf of the subjects of such powers on whose behalf it had been made. In no instance did those cases relate to private litigation between American citizens *inter se* based on controversies arising in jurisdictions with which the United States had no treaty.

POINT V.

Answering Respondent's Point V.

The statement at page 19 of respondent's brief that the several courts have unanimously ruled that the provisions of the Convention are self-executing is unfounded. The District Court of the United States in *Choy* v. *Pan American Airways, Inc.*, 1941 A. M. C. 483 (not officially reported), expressly held that the Convention was not self-executing and that its deficiencies prevented its application as a law. In the *Wyman* case the court held that *"no new cause of action was created by the Warsaw Convention"* and in the *Indemnity Insurance* case the court said *"I do not see how such a limitation can be administered"*.

The petition should be granted.

Respectfully submitted,

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